Supreme Court U.S.
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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

LINDA ARNDT, AN INDIVIDUAL,
Petitioner,

v.

THOMAS KOBY AND MARK BECKNER, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY, AND THE CITY OF BOULDER, A MUNICIPAL CORPORATION,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

A. BRUCE JONES
Counsel of Record
CONOR F. FARLEY
HOLLAND & HART LLP
555 Seventeenth St.
Denver, CO 80202
(303) 295-8000

JUDITH A. BIGGS
HOLLAND & HART LLP
1050 Walnut Street, Suite 500
Boulder, CO 80302
(303) 473-2700
Counsel for Petitioner

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QUESTION PRESENTED

The First Amendment protects the right of a public employee to speak on "matters of public concern." Here, a police detective was prohibited from responding publicly to wide-spread criticism in the media of her job performance. Does a public employee lose her First Amendment protection to speak on matters of public concern simply because her motivation for speaking is to salvage her reputation—a matter on which the circuits are in conflict?

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The opinion of the Tenth Circuit, review of which is sought by this petition, is reported at 309 F.3d 1247 (10th Cir. 2002), and is reproduced in the appendix ("App.") at A-1 to A-18. The District Court opinion is unreported, and is reproduced at B-1 to B-9.

JURISDICTION

The Tenth Circuit issued its decision on October 31, 2002, App. at A-1, and denied Ms. Arndt's petition for rehearing and rehearing *en banc* on December 6, 2002. App. at C-1.

The district court had jurisdiction of this civil rights action pursuant to 28 U.S.C. §§ 1331 and 1441 based on Plaintiff's assertion of a claim under 42 U.S.C. § 1983. The Tenth Circuit's jurisdiction was based on 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Tenth Circuit held that proposed speech intended to refute *public* attacks on the performance and integrity of a highly visible *public* official is not worthy of First Amendment protection, merely because the speech would have also served that official's personal interest in her reputation. This remarkable conclusion arose from an extraordinarily high profile situation.

The genesis of this case is the December 1996 murder of JonBenet Ramsey, and its aftermath, in Boulder, Colorado.[1] Petitioner Linda Arndt was one of the first detectives to arrive at the scene of the crime, and the only police officer present when JonBenet's body was discovered. Ms. Arndt was

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[1] The murder and its investigation has been the subject of several books, including *Perfect Murder Perfect Town*, by Lawrence Schiller.

involved in the subsequent investigation, until being removed from the case on May 13, 1997 by Defendant Thomas Koby, who was then the Boulder Police Chief.

In the interim, extensive criticism of Ms. Arndt was published in various media. The publications ranged from national radio and television broadcasts to the *New York Times* to international media to tabloids. *See, e.g.*, R. at 842:23 - 843:20; Aplt. App. at 543-683.[2] In an article in *Vanity Fair* magazine, she was even compared to Mark Fuhrman of the O.J. Simpson case. Aplt. App. at 633. These publications falsely accused Ms. Arndt of a variety of specific misdeeds and mistakes, and more generally suggested that she had bungled the investigation. *See, e.g.*, R. at 334:2-19.

When Ms. Arndt first raised concerns about this publicity with her superior officer, Commander John Eller, he informed her that the Boulder Police Department had a history of scapegoating officers when things did not go well. R. at 822:19-823:5. He also refused to defend her publicly, as did Chief Koby. R. 823, 828, 831. Further, Chief Koby had imposed a gag order that prevented Ms. Arndt from defending herself.

Eventually, Ms. Arndt retained legal counsel, who wrote directly to the Chief about Ms. Arndt's concerns. Aplt. App. at 687. In that correspondence, Ms. Arndt's lawyer, R. Brooke Jackson, identified eight false criticisms of his client.[3] *Id.* Included were claims that Ms. Arndt had failed to collect evidence, had provided a copy of a ransom note to the Ramsey attorneys without authorization to do so, had hacked into the Department's computers, and had left the investigation because of a mental breakdown. In a follow up phone conversation, Mr. Jackson asked Chief Koby to either

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[2] Citations to "R" and "Aplt.App." are to the record in the Court of Appeals.

[3] Mr. Jackson was later appointed to Colorado's state district court bench and thus discontinued his representation of Ms. Arndt prior to trial.

defend Ms. Arndt or allow her to speak on her own behalf. R. at 278:11 - 279:14. Mr. Jackson specifically informed Chief Koby that Ms. Arndt would not say anything that might harm the ongoing investigation. *Id.* Chief Koby informed Mr. Jackson that he agreed both that the criticisms of Ms. Arndt were false and unfair, and that speaking out would not harm the investigation. R. at 280:22 - 281:17. Nonetheless, he refused to speak on her behalf or lift the gag order. R. at 280:22 - 281:17; 306:17 - 307:14.

A number of the negative publications attributed their criticisms of Ms. Arndt to sources inside the Boulder Police Department, *i.e.*, to leaks. R. at 511:13 - 514:1. In fact, the Mark Fuhrman reference was so attributed. Aplt. App. at 641. Defendant Koby admitted to Ms. Arndt's attorney that he believed leaks came from within the Boulder Police Department, even going so far as to identify the person responsible. R. at 303:11-20. While the article in *Vanity Fair* prompted some preliminary actions within the Boulder Police Department to explore the leaks, the internal investigation was terminated when one of the Ramsey team investigators refused to take a polygraph exam. R. at 579:17 - 580:4.

Ms. Arndt eventually filed suit in state court, alleging a violation of her First Amendment rights. The case was removed to federal court by defendants. After surviving two motions for summary judgment, Ms. Arndt's claims went to trial on May 29, 2001. At the close of plaintiff's evidence, the trial court granted judgment for defendants under Rule 50, finding that Ms. Arndt's intended speech was not on a matter of public concern.

The Ramsey murder, and the failure of the Boulder Police Department investigation to achieve an arrest, was of intense public concern. Ms. Arndt presented extensive testimony supporting her claim that her intended speech also would have been of public concern. For example, Ms. Arndt's former counsel, R. Brooke Jackson, testified as follows:

> I wanted the public or at least that segment of the public that was interested in the Ramsey case and had followed it in the media to know the truth about Linda, about whether the investigation had been bungled which was a matter of tremendous public interest and comment about whether there were leaks by Linda such as the ransom note to the Ramsey team, things like that . . . And the rights of the listener are as much a part of it as the rights of the speaker; and in this case, the listener is the public that is following the Ramsey case in the media, and they have a right to know what is going on and what the truth is and a right to have false impressions corrected, subject always to whether or not they impede the investigation. It's all part of this.

R. at 331:21 - 332:17. Mr. Jackson cogently summarized this aspect of his testimony as follows:

> I don't know if there's a case in Colorado history that there's been more public concern about than this case; and what has been written about it from a very early time is how the cops

> in Boulder bungled it. Little town of Boulder, little police department didn't know what it was doing, wouldn't take help from anybody else, and Linda was right at the focal point of all that; the public needed to know that type of thing had not happened, and that Linda Arndt, who was being scapegoated for it, was not a bungler but was a competent police officer. That was the public concern.

R. at 334:9-19.

Ms. Arndt also testified on this subject:

> Q. Any of the items addressed in Mr. Jackson's letter, in your view would denying those, clearing those up, have impacted this investigation?
>
> A. I could only see a positive effect by denying these false statements.
>
> Q. What do you mean "positive effect"?
>
> A. I mean, the Boulder Police Department's reputation, the—the reputation of the Ramsey investigative team, certainly my reputation had all

> come into question; and by saying we were not the bunglers and the inept, incompetent individuals and investigators that some of us were portrayed as being, the community and, quite frankly, I guess, the morale of each of us would have been enhanced because we would believe— and continue to believe in what we were doing, knowing we were supported by the public that we served.

R. at 853:13 - 854:3. Ms. Arndt also emphasized that she did not wish to harm the investigation.

> Q. With respect to the various false accusations that have been made against you, did you feel like speaking about those in detail would jeopardize the investigation?
>
> A. No, they would not have jeopardized it. I believe they could only improve and enhance the damaged and tarnished credibility of the Boulder Police Department.

R. at 915:12-17.

Petitioner also presented expert testimony on this issue. D.P. Van Blaricom, a former police chief in Bellevue, Washington (a suburb of Seattle), who had been retained as an expert in over 900 cases involving police practices, testified as follows:

Q. Did you evaluate whether it was important to the public to be made aware that these criticisms were false?

A. Sure.

Q. And what was your evaluation in that regard?

A. Well, they should be, of course.

Q. Why is that?

A. Because it goes to the credibility of the whole department. The—the public has the right to know why an investigation is stymied. It's—it's convenient to let the public think that it's one person's fault; but if it isn't just one person's fault, then you should clarify that so that the public has confidence in the Department's ability to go forward.

R. at 449:18 - 450:5. Mr. Van Blaricom further explained why criticism of a particular officer will reflect poorly on the Department.

Because the officer is a member of that Department, has been trained by that Department, is under the control of that Department and is serving the community through that Department.

R. at 531:11-14. Mr. Van Blaricom also relied on a letter written by Defendant Beckner (who later succeeded Defendant Koby as Chief of Police), which was sent to the local Boulder newspaper in response to an editorial criticizing the investigation. R. at 451:3 - 453:5. This letter, which was admitted as an exhibit, ended with the following:

> It is also important for the citizens to know that not all the criticisms or misconceptions they read about are factual.

Aplt. App. at 685.

Chief Beckner confirmed these views in his own testimony.

> Q. Why was that important, if it was, to make that defense as it would relate to department integrity and public trust?
>
> A. Public confidence. You want the public to have confidence in how you're conducting the investigation.

R. at 1474:20-23. Moreover, Chief Beckner also elaborated on why it was of public concern to correct misleading leaks from within the Department.

> Q. And if the department were to be an instrument in providing misleading information to the public, how do you feel that would affect the department's integrity and the public trust given it.
>
> A. Well, it would destroy it and cause you all sorts of

> problems in terms of your effectiveness, prosecution of cases, public confidence. *It's just something you can't allow to happen.*

R. at 1439:24 - 1440:6 (emphasis added).

Ms. Arndt testified to how the failure to correct the misleading information affected her own ability to do her job after she was removed from the Ramsey case. As a result of being portrayed as incompetent and "a bungler," she could no longer gain the confidence of and effectively work with victims and witnesses. R. at 861:24 - 862:22. Further, her ability to obtain information from outside agencies was impacted. R. at 862:23 - 863:8. Finally, she became "the pariah" in the department, whose "credibility was shot." *Id.* at 863:9-24. Ultimately, Ms. Arndt's own work situation became so intolerable that she left the Department. R. at 865:17 - 866:14.

Despite this testimony, the trial court granted defendants' Rule 50 motion, ruling that Ms. Arndt's intended speech, as a matter of law, was not a matter of public concern. App. at B-4. In so ruling, the trial court ignored the content of the speech at issue, and instead focused on Ms. Arndt's motivation. *Id.*

In affirming the trial court's decision, the Tenth Circuit similarly disregarded the content of Ms. Arndt's proposed speech and held that because Ms. Arndt intended "to clear *her* personal reputation and restore *her* personal good name," her proposed speech did not address a matter of public concern. App. at A-11 (emphasis in original).

REASONS FOR GRANTING THE PETITION

I. THE COURT HAS NOT EXPRESSLY ADDRESSED THE ROLE OF MOTIVE IN THE PUBLIC CONCERN ANALYSIS, ALTHOUGH *CONNICK* STRONGLY SUGGESTS THAT MOTIVE IS NOT DECISIVE.

This Court's First Amendment precedents "have long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'" *Board of County Com'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (quoting *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517 (1892)). A government employer cannot "condition public employment on a basis that infringes the employee's constitutionally protected freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983).

A government employee's speech rights, however, are not absolute, requiring a balancing of various interests. A threshold question is whether the proposed speech touches upon a matter of public concern. *Id.* at 146. Matters of public concern are those "relating to any matter of political, social, or other concern to the community." *Id.* In determining whether a matter is one of public or private concern, courts are required to consider the "content, form, and context of a given statement, taken as a whole." *Id.* at 147-48. Speech that "seek[s] to bring to light actual or potential wrongdoing or breach of public trust" by a public official is a matter of public concern. *Id. See also Gardetto v. Mason*, 100 F.3d 803, 813 (10th Cir. 1996) ("[t]he performance and integrity of a highly visible public official . . . are unquestionably issues affecting the social and political concerns of a community.").

While the Court has not specifically held that motive cannot be a factor in the public concern analysis, *Connick* strongly suggests that conclusion. Indeed, in *Connick*, the employee

was unhappy with her proposed transfer and the Court held that this unhappiness motivated her distribution of a questionnaire to fellow employees. *Id.* at 148 (the questions in the public employee's questionnaire were "mere extensions of [her] dispute over her transfer. . . . [T]he focus of [plaintiff's] questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors"). Despite the employee's personal stake in the subject matter of her speech, however, the Court held that "[w]hether an employee's speech addresses a matter of public concern *must* be determined by the content, form, and context of a given statement, taken as a whole." *Id.* at 147-48 (emphasis added). Because the content of one question on the employee's questionnaire "touched" upon a matter of public concern, the Court held that the first element of the constitutional test had been satisfied. *Id.* at 149. *Cf. id.* at 147 ("[w]hen a public employee speaks out not as a citizen upon matters of public concern, but instead as an employee upon matters *only* of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency.") (emphasis added). *Connick*, therefore, strongly suggests that the speaker's motive is not decisive in the public concern analysis. Lower courts, however, are in disagreement about this aspect of *Connick*.

II. NOTWITHSTANDING *CONNICK*, CONFLICT AND CONFUSION EXIST IN THE CIRCUIT COURTS OF APPEAL CONCERNING WHETHER, AND TO WHAT EXTENT, MOTIVE CAN BE CONSIDERED IN THE PUBLIC CONCERN ANALYSIS.

The Circuits are (and have been for some time) in considerable disagreement about whether, and to what extent, motive plays a role in the "public concern" analysis. For

example, some courts have held that speech addressing a matter of public concern will nevertheless not receive First Amendment protection if the speaker had a personal stake in the subject-matter of the speech. *See, e.g., Teague v. City of Flower Mound*, 179 F.3d 377, 383 (5th Cir. 1999) (denying First Amendment protection because, even though the police officers' grievances were "interspersed with apparently genuine concerns regarding police wrongdoing," the speakers' grievances "were primarily motivated by, and primarily addressed, concerns particular to their private interests"); *Morgan v. Ford*, 6 F.3d 750, 754 (11th Cir. 1993) ("The mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment. Rather, we must determine whether the purpose of [the] speech was to raise issues of public concern, on the one hand, or to further [one's] own private interest, on the other."); *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1059 (2nd Cir. 1993) ("even as to an issue that could arguably be viewed as a matter of public concern, if the employee has raised the issue solely in order to further his own employment interest, his First Amendment right to comment on that issue is entitled to little weight."); *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) ("the *Connick* test requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?").

These courts invariably rely on the distinction cited by the Court in *Connick* between speaking as a "public employee" versus speaking as a "citizen," as justification for making motive the dispositive consideration in the public concern analysis. *See, e.g., Morgan*, 6 F.3d at 754. This approach disregards both the plain meaning of *Connick*'s holding that speech is not protected when "an employee [speaks] upon matters *only* of personal interest," 461 U.S. at 147 (emphasis

added), but *Connick*'s outcome, as well. *See id.* (holding that the speech at issue addressed a matter of public concern notwithstanding that the employee's speech was personally motivated). *See also Azzaro v. County of Allegheny*, 110 F.3d 968, 979 n.5 (3d Cir. 1997) (*en banc*) ("In context, however, we believe this sentence was intended to contrast 'matter of public concern' with 'matters only of personal interest' and not to suggest a critical distinction based on the subjective motivation of the employee. . . [T]he latter interpretation is inconsistent with the holding in that case.").

Other courts have held that motive is one factor of several to be considered when undertaking the public concern analysis. *See, e.g., Chappel v. Montgomery County Fire Protection District No.1*, 131 F.3d 564, 576 (6th Cir. 1997) ("'the motive which underlies an employee's statements is a relevant, but not necessarily dispositive factor' when considering whether an employee's statements may be fairly characterized as relating to any matter of political, social, or other concern to the community."); *Tao v. Freeh*, 27 F.3d 635, 639 (D.C. Cir. 1994) ("the motivation of the employee is only one factor to be considered in assessing whether a statement is one of public concern."); *Rode v. Dellarciprete*, 845 F.2d 1195, 1201 (3rd Cir. 1988) ("motivation [is] merely one factor to be considered, but not necessarily controlling, in assessing the character of the employee's speech.")

Finally, some courts have held that motive is irrelevant when speech clearly addresses a matter of public concern. *See, e.g., O'Connor v. Steeves*, 994 F.2d 905, 913 (1st Cir. 1993) (speech receives First Amendment protection when "a public employee speaks out on a topic which is clearly a legitimate matter of *inherent* concern to the electorate.") (emphasis in original); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)) ("speech that concerns 'issues about which information is needed or appropriate to enable the members of society' to make informed decisions about the

operation of their government merits the highest degree of first amendment protection.").

The confusion exhibited between Circuits is also found within Circuits. For example, in *Linhart*, the Seventh Circuit held that "the [*Connick*] test requires us to look at the *point* of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" 771 F.2d at 1010 (emphasis in original). In *Berg v. Hunter*, 854 F.2d 238 (7th Cir. 1988), by contrast, the Seventh Circuit held that

> [a]lthough the point or motive behind an employee's speech is relevant in determining whether matters of public concern are implicated by that speech, motive alone is not dispositive. A fair reading of *Connick* simply will not support the use of such a litmus test. . . . This court also has recognized that content is the single greatest factor in the *Connick* inquiry.

Id. at 242-43. Other circuits have similarly conflicting authority. *Compare Teague*, 179 F.3d at 383 (holding that although the police officers' grievances were "interspersed with apparently genuine concerns regarding police wrongdoing," because their grievances "were primarily motivated by, and primarily addressed, concerns particular to their private interests," their speech was not on a matter of public concern) *with Gonzalez v. Benavides*, 774 F.2d 1295, 1300 (5th Cir. 1985) ("We do not read *Connick*, however, to exclude the possibility that an issue of private concern to the employee may also be an issue of public concern.").

Given the conflict in the Circuits, it is not surprising that similar cases produce different outcomes in the district courts. While the trial court in this case held that Ms. Arndt's proposed speech did not touch upon a matter of public concern, the court in *Kessler v. City of Providence*, held that a public denial by the plaintiff police officer that she had bungled two sexual assault investigations, "obviously" addressed a matter of public concern. 167 F.Supp.2d 482, 486 (D.R.I. 2001). The plaintiff in *Kessler* was not subjected to as much public scrutiny as Ms. Arndt. *Cf. Miles v. Ramsey*, 31 F. Supp.2d 869, 875 (D. Colo. 1998) ("It is undeniable that JonBenet's murder investigation has drawn almost unprecedented media attention."). Given the level of confusion displayed between and within the lower courts, the question of what role motive plays in the "public concern" analysis is ripe for clarification by the Court.

III. THE TENTH CIRCUIT'S FOCUS ON MS. ARNDT'S MOTIVE VIOLATES THE FIRST AMENDMENT AND WILL HAVE A CHILLING EFFECT ON SPEECH BY PUBLIC EMPLOYEES.

A. THE TENTH CIRCUIT DENIED MS. ARNDT FIRST AMENDMENT PROTECTION BECAUSE SHE HAD A PERSONAL STAKE IN THE SUBJECT MATTER OF HER PROPOSED SPEECH.

The Tenth Circuit's decision in this case reflects the confusion described above concerning whether a speaker's motive plays a role in the public concern analysis. The decision holds that a *public* denial by a highly visible *public* official of inaccurate *public* criticism of her performance in the *most publicized* murder investigation in the recent history of Colorado does not address a matter of public concern. The Tenth Circuit reached this remarkable conclusion by

mistakenly focusing not on the content and context of Ms. Arndt's proposed speech, but on her motive for wanting to speak out.

In its opinion, the Tenth Circuit's stated basis for denying First Amendment protection for Ms. Arndt's proposed speech is that "she sought, through her proposed speech, to clear *her* personal reputation and restore *her* personal good name." App. at A-11 (emphasis in original). *See also id.* at A-14. (Ms. Arndt's proposed speech is not worthy of First Amendment protection because she was "'an employee [*seeking* to speak] upon matters only of personal interest' not a 'citizen upon matters of public concern'") (emphasis added) (quoting *Connick*, 461 U.S. at 147). The Tenth Circuit ignored or avoided the testimony at trial and instead cited to paragraphs in the *Complaint* and deposition testimony that address only Ms. Arndt's understandable desire to clear her own name. *See id.* at A-9 to A-10 (citing paras. 13, 16-18 of the *Complaint* and highly selective excerpts from Ms. Arndt's deposition).[4] In so doing, the Tenth Circuit did not merely rely on Ms. Arndt's motive as justification for its opinion, it made it the determinative factor in its decision.

The Tenth Circuit purports to address the content of Ms. Arndt's proposed speech. *See id.* at A-9 ("we conclude that the content of Ms. Arndt's speech supports the conclusion that her proposed speech addressed purely personal concerns, not matters of public concern."). But the Tenth Circuit's

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[4] In relying exclusively on evidence outside of the *trial* record to support its decision, the Tenth Circuit disregarded its duty "'[i]n cases raising First Amendment issues . . . 'to make an independent examination of the whole record in order to make sure that the judgment does not constitute a *forbidden intrusion on the field of free expression.*'" *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 284-286, (1964)) (emphasis added). The Tenth Circuit undertook an independent examination of seemingly everything but the trial record in order to *deny* Ms. Arndt's proposed speech First Amendment protection.

"content" analysis focuses exclusively on Ms. Arndt's motive for speaking out. Indeed, the decision never mentions or otherwise addresses the content of Ms. Arndt's proposed speech, other than a single general statement that it "was a refutation of allegations impugning her reputation." *Id.* at A-8. Those same allegations were of critical public concern, as reflected by the massive media coverage of the murder case, in that they questioned her competency as a police officer.

The decision disregards the uncontradicted evidence presented at trial that the false criticism of Ms. Arndt undermined the public's trust in the integrity and effectiveness of the *entire* Boulder Police Department. *See supra* at 6-8. Indeed, the court essentially negates its own precedent. *See Lytle v. City of Haysville, Kan.*, 138 F.3d 857, 867 (10th Cir. 1998) ("This circuit has recognized [that] . . . 'each officer's competence affects the overall effectiveness of the department.'") (quoting *Melton v. City of Oklahoma City*, 879 F.2d 706, 715 (10th Cir. 1989)). Finally, the Tenth Circuit's opinion ignores the clear inference that the public necessarily would have drawn from Ms. Arndt's denials of the public criticisms of her, *i.e.*, that through leaks and innuendo, Ms. Arndt had been scapegoated for the problems in the Ramsey investigation. Instead, the Tenth Circuit denied First Amendment protection merely because the speech would have served Ms. Arndt's personal interest, as well.

B. BECAUSE WRONGDOING IS TYPICALLY REPORTED BY THOSE WITH A PERSONAL STAKE IN EXPOSING THE WRONGDOING, THE TENTH CIRCUIT'S OPINION WILL HAVE A CHILLING EFFECT ON PUBLIC EMPLOYEES WHO HAVE THE MOST IMPORTANT INFORMATION CONCERNING OUR GOVERNMENTAL INSTITUTIONS.

Speech on "matters of public concern" are "at the heart of the First Amendment's protection." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 776 (1978) (citing *Thornhill v. Alabama,* 310 U.S. 88, 101 (1940)). As the Court has stated,

> the Constitution's special concern [for speech on public issues] is no mystery. The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' '[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.

Connick, 461 U.S at 145 (internal citations omitted).

Eliminating Constitutional protection for speech in which the speaker has a personal interest would contravene the interests served by the First Amendment. Indeed, "[w]rongdoing may often be revealed to the proper authorities only by those who have some personal stake in exposing wrongdoing." *Breuer v. Hart*, 909 F.2d 1035, 1039 (7th Cir. 1990). For this reason, "[d]ismissing [] speech as unprotected merely because [the speaker] had a personal stake in the controversy fetters public debate on an important issue because it muzzles an affected public employee from speaking out." *Rode*, 845 F.2d at 1202. *See Tao*, 27 F.3d at 640 ("the fact that Tao was motivated by her own desire to be promoted does not prevent her statement about racial discrimination from being protected."); *Gonzalez*, 774 F.2d at 1300-01 ("Gonzalez's disagreement with the commissioners indisputably was a matter of concern to Gonzalez as an employee. We do not read *Connick*, however, to exclude the possibility that an issue of private concern to the employee may also be an issue of public concern."). Accordingly, denying protection to *public* speech intended to refute *public* attacks on the performance and integrity of a highly visible *public* official, merely because the speech also serves her personal interest, is contrary to the purpose of the First Amendment. Such an approach adversely impacts both the public and the marketplace of ideas by limiting input from those individuals who likely have important information concerning our governmental institutions.

This Court's precedents serve the dual purpose of protecting the free speech rights of public employees and enabling the public to have access to critical information. Seldom will such information be disclosed by selfless employees, interested solely in enlightening the citizenry. While every internal employment dispute should not give rise to a constitutional controversy, neither should government employees be hesitant to speak out on public issues for fear their motives will be questioned. The *Connick* test thus looks

at content, form and context. The Court should clarify how motive affects the analysis, and do so in a manner that protects both the speaker and her audience.

C. Under the Seventh Amendment, The Public Employee's Motive in Speaking Out Cannot Be A Part of the Public Concern Analysis.

Additional, practical considerations counsel against emphasizing motive. The Seventh Amendment grants a plaintiff who alleges a Constitutional claim pursuant to 42 U.S.C. § 1983 "the right to a jury's resolution of the ultimate dispute." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 718 (1999) (quoting *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 377 (1996)). *See also id.* at 709 ("We hold that a § 1983 suit seeking legal relief is an action at law within the meaning of the Seventh Amendment."). Under the Seventh Amendment, "predominantly factual issues are in most cases allocated to the jury." *Id.* at 720.

Here, because the motive of a speaker is a "predominantly factual issue[]," it should not factor into the public concern analysis, which is a question of law. *Id. See also Connick*, 461 U.S. at 148 n.7 ("The inquiry into the protected status of speech is one of law, not fact."). As the Court has noted, reserving factual issues for the jury to decide "rests on a firm historical foundation." *Id.* This conclusion is further supported by the traditional view that juries are better able to adjudicate factual disputes. *Id.* at 720-21.

To the extent that the public concern analysis involves consideration of differing factual accounts, *Connick* avoids the Seventh Amendment problem by requiring that speech merely "touch[] upon" a matter of public concern. *Connick*, 461 U.S. at 147. *See also Rankin v. McPherson*, 483 U.S. 378, 386 n. 7 (1987) (noting that speech only needs to "touch upon a matter of public concern"). With respect to disputes

concerning the "content, context, and form" of the speech at issue, a trial court can address such a low evidentiary threshold without intruding on a plaintiff's constitutional right to have a jury decide disputed factual questions. The motive of the speaker is entirely different, however, because it necessarily requires the finder of fact to address the credibility of the witnesses who testify on the subject. *Cf. Casey v. City of Cabool, Missouri*, 12 F.3d 799, 803 (8th Cir. 1993) ("When balancing the free speech and administrative interests. . . . any underlying factual disputes concerning whether the speech at issue was protected should have been submitted to the jury."). For this reason, the Seventh Amendment prohibits motive from being a part of the public concern analysis as a "matter of law". This Court's guidance is needed to both clarify First Amendment doctrine, and to prevent infringement on Seventh Amendment rights.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests the Court to grant the Petition for Writ of Certiorari.

Respectfully submitted,

A. BRUCE JONES
Counsel of Record
CONOR F. FARLEY
HOLLAND & HART LLP
555 Seventeenth St.
Denver, CO 80202
(303) 295-8244

JUDITH A. BIGGS
HOLLAND & HART LLP
1050 Walnut Street, Suite 500
Boulder, CO 80302
(303) 473-2700

No. _____

IN THE
Supreme Court of the United States

LINDA ARNDT, AN INDIVIDUAL,
Petitioner,

v.

THOMAS KOBY AND MARK BECKNER, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITY, AND THE CITY OF BOULDER, A MUNICIPAL CORPORATION,
Respondents.

On Writ of Certiorari To The United States Court Of Appeals For The Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

A. BRUCE JONES
COUNSEL OF RECORD
CONOR F. FARLEY
HOLLAND & HART, LLP
555 Seventeenth St.
Denver, CO 80202
(303) 295-8000

JUDITH A. BIGGS
HOLLAND & HART, LLP
1050 Walnut St.
Suite 500
Boulder, CO 80302
(303) 473-2700
Counsel for Petitioner

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA ARNDT, Plaintiff-Appellant, v. THOMAS KOBY and MARK BECKNER, individually and in their official capacity; THE CITY OF BOULDER, a municipal corporation, Defendants-Appellees	No. 01-1356

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. NO. 98-WY-1198-WD)

A. Bruce Jones, Holland & Hart, Denver, Colorado (Conor F. Farley, Holland & Hart, Denver, Colorado, and Judith A. Biggs, Holland & Hart, Boulder, Colorado, with him on the briefs), for Plaintiff-Appellant.

Leslie L. Schluter (Sue An Haskell with her on the brief), Brooks & Schulter, Denver, Colorado, for Defendants-Appellees.

BEFORE **BRICOE, ANDERSON,** and **O'BRIEN,** Circuit Judges.

ANDERSON, Circuit Judge.

Plaintiff Linda Arndt filed suit against her employer, the City of Boulder, Colorado, its police chief and his successor, asserting a violation of her First Amendment free speech rights, as well as violations of Colorado state law. The district court granted summary judgment to the defendants on the Colorado state law claims, and granted judgment as a matter of law on her 28 U.S.C. § 1983 First Amendment claim. She appeals those rulings, which we affirm.

BACKGROUND

Six-year-old JonBenet Ramsey was murdered inside her home in Boulder, Colorado, on December 26, 1996. Ms. Arndt, at that time a detective with the Boulder Police Department, was one of the first officers to arrive at the crime scene, the Ramsey home, and was the only officer present when the child's body was found. Ms. Arndt was involved in the murder investigation until she was removed from the case in May 1997 by defendant Thomas Koby, then the Boulder Police Chief.

While she was involved in the investigation, and continuing for some period of time following her removal from the case, Ms. Arndt and other officers involved in the Ramsey murder investigation were widely criticized in the media. The criticisms generally alleged that Ms. Arndt and others had made mistakes and otherwise mishandled the investigation, which contributed to the police department's inability to identify and apprehend a suspect. She asserts that these criticisms were false and harmed her reputation. She alleges that she discussed these criticisms with Chief Koby and others. Neither Chief Koby nor anyone else in the police department took any action regarding these alleged

criticisms. Additionally, Chief Koby imposed a gag order prohibiting anyone in the Boulder police department from speaking to the media about the Ramsey investigation.

Ms. Arndt then retained an attorney, R. Brooke Jackson, who, in October 1997, wrote a letter to Chief Koby listing eight allegedly false statements made about Ms. Arndt. In particular, the letter stated that:

> [N]o one within the Department has made any effort of which we are aware to stand behind Linda publicly, to correct the factual errors being made, or otherwise to support her. Her reputation has been harmed and continues to be harmed. She has been allowed to become a scapegoat, if not the primary scapegoat, by a continuous series of statements about one thing or another that she supposedly did that are simply false.

Def.'s Ex. B, Appellant's App. Vol. I at 124. In a subsequent telephone conversation, Mr. Jackson asked Chief Koby to either defend Ms. Arndt or allow her to speak out herself to respond to the criticism. Chief Koby declined.

Ms. Arndt filed her complaint on May 19, 1998, while still employed by the police department. She asserted a violation of her First Amendment right to

speak out on a matter of public concern, based on the fact that she was prevented by the gag order from publicly responding to the allegedly false and harmful media statements about her. She also alleged a Colorado constitutional claim as well as a state law claim for false light invasion of privacy.[1]

She quit the department on May 1, 1999. Defendants[2] filed motions to dismiss and for summary judgment, which the district court denied on November 30, 2000, concluding that Ms. Arndt's complaint sufficiently stated a claim for relief such that "[it] would be inappropriate for the Court to engage in the applicable balancing test at this stage of the proceedings." Appellant's App. Vol. 1 at 52-53.

In March 2001, defendants filed a second motion for summary judgment which the court granted in part and denied in part. The court granted summary judgment to defendants on Ms. Arndt's state law claims. The case proceeded to trial on May 29, 2001, on the First Amendment claim. On June 4, defendants filed a motion for judgment as a matter of law. On June 11, the court heard arguments on the motion and on June 12, at the close of Ms. Arndt's case-in-chief, it

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[1] At oral argument of this appeal, Ms. Arndt's attorney conceded that a recent decision by the Colorado Supreme Court in The Denver Publ'g Co. v. Bueno, No. 01SC386, 2002 WL 31097976 (Colo. Sept. 16, 2002), eliminated Ms. Arndt's state false light invasion of privacy claim.

[2] Mark Beckner was added as a defendant when he succeeded Chief Koby as Chief of the Boulder Police Department.

granted the motion, concluding that the speech Ms. Arndt alleged she was prevented from making was not on a matter of public concern, as required for Ms. Arndt's claim to succeed under applicable case law.

Ms. Arndt appeals, arguing (1) the district court erred in holding that her proposed speech was not on a matter of public concern; (2) the balancing required under United States v. Nat'l Treas. Employees Union, 513 U.S. 454 (1995) ("NTEU") and Pickering v. Bd. of Educ., 391 U.S. 563 (1968) must be conducted by a jury on remand; and (3) the district court erred in dismissing her claim under the Colorado Constitution.

DISCUSSION

"We review the district court's grant of judgment as a matter of law *de novo*, using the same standard as the district court." Lantec, Inc. v. Novell, Inc., No. 01-4109, 2002 WL 31087822, at *15 (10th Cir. Sept. 19, 2002). Accordingly, "[j]udgment as a matter of law 'is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion.'" Id. (quoting Baty v. Willamette Indus., Inc., 172 F.3d 1232, 1241 (10th Cir. 1999) (further quotation and citation omitted)). Further, "'if there is no legally sufficient evidentiary basis with respect to a claim . . . under the controlling law,'" we must affirm the grant of judgment as a matter of law to the party prevailing below. Id. (quoting Baty, 172 F.3d at 1241) (further quotation and citation omitted)).

We review the grant of summary judgment de novo, applying the same standard as did the district

court. PeTA, People for the Ethical Treatment of Animals v. Rasmussen, 298 F.3d 1198, 1203 (10th Cir. 2002). Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In cases involving the First Amendment, the de novo standard is `appropriate . . . for the further reason that . . .[i]n cases raising First Amendment issues . . .an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression."' Horstkoetter v. Dept of Pub. Safety, 159 F.3d 1265, 1270 (10th Cir. 1998) (quoting Lytle v. City of Haysville, 138 F.3d 857, 862 (10th Cir. 1998) (further quotation omitted)).

It is well established that "a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." Connick v. Myers, 461 U.S. 138, 142 (1983) (citations omitted); see also NTEU, 513 U.S. at 465; Bass v. Richards, No. 01-1202, 2002 WL 1859034, at *5 (10th Cir. Aug. 14, 2002); Koch v. City of Hutchinson, 847 F.2d 1436, 1440 (10th Cir. 1988) (en banc). However, when the government acts as an employer, "the First Amendment does not apply with full force." Horstkoetter, 159 F.3d at 1271. Thus, the government as employer "may impose restraints on the job-related speech of public employees that would be plainly unconstitutional if applied to the public at large." NTEU, 513 U.S. at 465. If the government restrains the free speech rights of its employees, we assess the validity of that restraint by balancing "the

interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, 391 U.S. at 568. Accordingly, "private speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing any special burden of justification on the government employer." NTEU, 513 U.S. at 466. Restrictions or sanctions on employee speech on matters of public concern, by contrast, impose upon the government "the burden of justifying its adverse employment action." Id.; see also Rankin v. McPherson, 483 U.S. 378, 388 (1987).

Pickering and Connick and subsequent cases applying their balancing test involved an employee challenge to the constitutionality of an adverse employment action previously taken in response to speech already made. NTEU, on the other hand, involved a prior restraint imposed by the government upon employee speech: "unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens." NTEU, 513 U.S. at 468. This case too involves a prior restraint, although it involves a restraint of far less breadth and involves far few employees than the restraint at issue in NTEU. In such a case involving a prior restraint of employee speech, while the Pickering/Connick balancing test applies, it modified:

> [T]he government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary

> action. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the Government.

NTEU, 513 U.S. at 468 (quoting Pickering, 391 U.S. at 571).[3]

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[3] NTEU addressed the constitutionality of a federal law prohibiting federal employees from accepting honoraria for speeches or articles. The Supreme Court acknowledged that the breadth of the ban on speech, and the fact that it constituted a prior restraint of such speech, distinguished it from the Court's prior applications of Pickering's balancing test: "The honoraria ban as applied to respondents burdens speech far more than our past applications of Pickering because the ban deters an enormous quantity of speech before it is uttered, based only on speculation that the speech might threaten the Government's interests." NTEU, 513 U.S. at 467 n.11.

Given our disposition of this case, we need not determine whether NTEU's imposition of a greater burden on the government to justify its restraint of employee speech depends upon all of the factors present in that case—a broad statutory ban which operated as a prior restraint applicable to a very large group of

In any event, under the Pickering balancing test, whether modified or not, the threshold inquiry in analyzing the constitutionality of a governmental restriction on employee speech is whether the particular speech at issue was on a matter of public concern. That is a question of law for the court to determine. Bass, 2002 WL 1859034, at *5. "A matter is of public concern . . . if it is 'of interest to the community, whether for social, political, or other reasons.'" Horstkoetter, 159 F.3d at 1271 (quoting Lytle, 138 F.3d at 863). By contrast, speech of purely personal interest, or involving internal personnel disputes, is not of public concern. See id; see also Bass, 2002 WL 1859034, at *5.

In determining whether employee speech addresses matters of public concern we examine "the

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(cont'd.)..
employees-or whether any of those factors, or some combination thereof, justify the greater burden. Cf. Latino Officers Assoc. v. City of New York, 196 F.3d 458, 464 (2d Cir. 1999) ("Application of NTEU standard turns on whether a government employee's expression is restricted 'through a generally applicable statute or regulation, as opposed to a particularized disciplinary action.'") (quoting Weaver v. United States Info. Agency, 87 F.3d 1429, 1439 Cir. 2002) (discussing NTEU and Pickering and following the Second Circuit analysis in Latino Officers Assoc.); Shelton Police Union, Inc. v. Voccola, 125 F. Supp. 2d 604, 623 (D. Conn. 2001) ("[T]he government's burden of demonstrating that its interests outweigh the interests of the speakers is greater in cases involving a prior restraining as opposed to cases involving isolated disciplinary action.").

content, form and context of a given statement, as revealed by the whole record," bearing in mind that our object is to distinguish between "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest." Connick, 461 U.S. at 147-48. We turn, therefore, to the content, form and context of Ms. Arndt's proposed speech in this case.

As indicated, Ms. Arndt, as well as various other members of the Ramsey investigative team, had been criticized by the media for the way in which the Ramsey investigation proceeded. Ms. Arndt sought to either have Chief Koby issue a brief statement refuting alleged inaccuracies concerning Ms. Arndt's conduct in the Ramsey investigation, or, if he refused, she sought permission to make such a statement, despite the gag order barring any statements to the media. Thus, the content of Ms. Arndt's proposed speech was a refutation of allegations impugning her reputation.

After carefully reviewing the entire record in this case, we conclude that the content of Ms. Arndt's speech supports the conclusion that her proposed speech addressed purely personal concerns, not matters of public concern. Beginning with her complaint, and continuing through depositions and her trial testimony, Ms. Arndt's own averments, statements and testimony indicate she sought, through her proposed speech, to clear her personal reputation and restore her personal good name.

Her complaint avers the following:

> 13. A number of purported facts about Detective Arndt's actions

have been published, often more than once, and often after she stopped working on the case, in the print and/or broadcast media.

. . .

16. The publication and broadcast of such false statements sullied the reputation Detective Arndt had earned as a police officer and detective.

17. These publications and broadcasts have either stated or implied that Detective Arndt "bungled" the investigation in its early stages and is partly, if not largely, responsible for the problems that have plagued the investigation of the Ramsey murder.

18. The Boulder Police Department, and Defendant Koby in particular, were aware, during the entire period of time when such media publications and broadcasts were being made and re-made, that these statements about Detective Arndt were untrue and were creating an unfair and

> damaging public perception
> about Detective Arndt's role
> in the Ramsey investigation.

First Am. and Supp. Compl. at ¶¶ 13-18, Appellant's App. Vol. I at 34-36 (emphasis added). The complaint continues to emphasize that Ms. Arndt's concern, and the speech in which she sought to engage to alleviate that concern, was about the alleged harm to her alone.

Chief Koby's testimony supports this view of Ms. Arndt's proposed speech. He testified that "Linda never, to my knowledge, expressed concern about the other members of the team. It was always what her concern is, her this, and her that." Dep. of Chief Koby at 127, id. at 147. Ms. Arndt testified that when her attorney, Mr. Jackson, contacted Chief Koby to inquire about making a statement on Ms. Arndt's behalf, she wanted "[a] brief statement saying that the statements about me were false." Dep. of Ms. Arndt at 268, id. at 325 (emphasis added). When asked, "[i]t was your reputation you were concerned with, right?" Ms. Arndt responded, "[s]ure was." Id. at 269.[4] Moreover, Ms. Arndt testified repeatedly that she simply wanted Chief Koby to deny the eight specific instances of alleged misconduct by Ms. Arndt detailed in Mr. Jackson's letter, or, if Chief Koby refused to so deny them, she

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[4] For example, in explaining why she discussed with a television news show producer the possibility of appearing on a national morning news program, Ms. Arndt testified it was because "[t]here was no, no attempt[] by the Boulder Police Department to ever clear my name." Dep. of Ms. Arndt at 17, Appellant's App. Vol. I at 261 (emphasis added).

wanted the opportunity to deny them herself.[5] Each of those eight allegations related solely and specifically to Ms. Arndt, not the Boulder police department in general or other participants in the Ramsey investigation. All of this evidence indicates, therefore, that her proposed speech was that of "an employee [seeking to speak] upon matters only of personal interest," not a "citizen upon matters of public concern." Connick, 461 U.S. at 147.

Ms. Arndt argues that, even if the content of her speech primarily sought to restore her personal reputation, "the performance and integrity of a highly visible public official" necessarily is a matter of public concern. Appellant's Opening public concern, that is not always so. See Koch, 847 F.2d at 1447 (noting that a public employee's "own competence to perform his

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[5] At trial the following interchange occurred during cross-examination of Ms. Arndt:

> Q . . . There were eight points listed in the Brooke Jackson letter, correct?
>
> A Yes.
>
> Q Brooke Jackson just wanted Chief Koby to deny those eight allegations, correct?
>
> A Yes.
>
> Q And if Chief Koby wasn't willing to do that, he wanted the opportunity for you to deny those with allegations, correct?
>
> A Yes.

Tr. at 1230-31, Appellant's App. Vol. X.

job could be a matter of public concern.") (emphasis added). "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark-and certainly every criticism directed at a public official-would plant the seed of a constitutional case." Connick, 461 U.S. at 149; see also Hesse v. Bd. of Educ. of Township High Sch. Dist. No. 211, 848 F.2d 748, 751-52 (7th Cir. 1988) ("While it cannot be gainsaid that educational policies in a public school are matters of public concern, all but one of the plaintiff's memoranda and statements were directed to the defense of his personal teaching methods and his resentment of the evaluations and criticisms of those methods."). The fact that Ms. Arndt was a police detective working on a murder investigation which had garnered tremendous media attention does not alone transform her speech designed to refute media criticisms of her personal, individual competence in that particular investigation into speech on a matter of public concern.

Ms. Arndt also argues that the form and context of her proposed speech-a public response to media coverage of a sensational murder investigation-somehow transforms her personal and specific desire to restore her reputation into a matter of public concern. We disagree.

While it is true that the Ramsey investigation was the subject of intense media interest, that alone will not convert speech in some way connected to such an investigation into speech of public concern. See Lancaster v. Indep. Sch. Dist. No. 5, 149 F.3d 1228, 1233 (10th Cir. 1998) ("Media publicity of a dispute is not determinative of whether a public employee's speech was a matter of public concern."); Koch, 847

F.2d at 1445 (noting that "what is of general interest to the public is not necessarily of public concern for First Amendment purposes"). Further, the fact that she wished to respond publicly to media criticisms does not necessarily indicate that her speech touched a matter of public concern. See Lancaster, 149 F.3d at 1233 (holding that an employee's comments made to a newspaper were not on a matter of public concern). Thus, neither the form nor the context of her proposed speech compel the conclusion that her proposed speech was on a matter of public concern for First Amendment purposes. They do not overcome the fact that the content of her speech overwhelmingly supports the conclusion that her speech was purely personal.

Finally, Ms. Arndt argues that the district court improperly gave, and defendants urge us to improperly give, decisive weight to her motive in speaking. She argues that our court has held that motive is not determinative. We agree that an employee's subjective motivation, standing alone, is not determinative. Rather, we look at motive as a way to help us assess the content of the speech "to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." Gardetto v. Mason, 100 F.3d 803, 812 (10th Cir. 1996); see also Lighton v. Univ. of Utah, 209 F.3d 1213, 1224 (10th Cir. 2000). Ms. Arndt's proposed speech was clearly "calculated to redress personal grievances." Gardetto, 100 F.3d at 812. Thus, the fact that Ms. Arndt was motivated to salvage her personal reputation, and that her proposed speech was tailored to achieve that goal, supports our assessment that her proposed speech addressed purely personal and individual concerns.

In sum, we conclude that the district court correctly held that Ms. Arndt's proposed speech did not address matters of public concern and was accordingly not protected by the First Amendment. We therefore need not address the Pickering/NTEU balancing inquiry.

Ms. Arndt also argues the district court erred in granting summary judgment on her state law claims, of which only one remains on appeal. Ms. Arndt's remaining claim invokes the Colorado Constitution's free speech clause. See Colo. Const. art. II, § 10. The district court granted summary judgment to defendants on the claim, concluding that the existence of Ms. Arndt's § 1983 claim provided an adequate remedy such that a separate Colorado constitutional claim was "unnecessary." Tr. of Tel. Oral Ruling on Defs.' Second Mot. for Summ. J. at 5, Appellant's App. Vol. I at 353. We agree.

In Bd. of County Comm'rs v. Sundheim, 926 P.2d 545 (Colo. 1996) (en banc), the Colorado Supreme Court held that "[w]bile it may be appropriate to recognize an implied state constitutional cause of action when there is no other adequate remedy . . . where other adequate remedies exist, no implied remedy is necessary." Id. at 553. Section 1983 provides such an adequate remedy. The fact that Ms. Arndt ultimately has not prevailed on her section 1983 claim does not make it any less "available" as a legal remedy under Sundheim. See Brammer-Hoelter v. Twin Peaks Charter Acad., 81 F. Supp. 2d 1090, 1097-98 (D. Colo. 2000).

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

LINDA ARNDT, an individual,	)
	)
Plaintiff,	)
	)
vs.	)
	)
CITY OF BOULDER, a municipal corporation,	)
	)
	)
Defendant.	)

TRANSCRIPT OF ORAL RULING ON DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

PROCEEDINGS had before the Honorable William F. Downes, Chief United States District Judge for the District of Wyoming, sitting by designation for the District of Colorado, on 12th day of June, 2001, at the United States District Courthouse, Denver, Colorado.

THE COURT: The Court is prepared to issue a ruling at this time.

Before the Court is the defendant's motion for judgment as a matter of law made pursuant to Federal Rule of Civil Procedure 50. While ordinarily Rule 50 contemplates whether or not the plaintiff has established a legally sufficient evidentiary basis for an issue to go to a jury, the First Amendment claim before this Court actually involves an issue of law for the Court's determination.

It is well established that a state may not, quote, condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of speech, close quote. Koch versus City of Hutchinson, 847 F.2d 1436, 1440, Tenth Circuit 1998; citing Connick versus Meyers, 461 U.S. 138, 142, 1983.

The basis framework for analyzing a claim by a public employee that his or her governmental employer made an adverse employment decision in violation of the employee's First Amendment rights was set forth in Pickering versus Board of Education, 391 U.S. 563, 568, 1968. The so-called Pickering test has been employed in the context of claims that involve the prior restraint of an employee's speech. United States versus National Treasury Employees Union, 513 U.S. 454, 1995. The first step of the Pickering balancing test requires the Court to determine whether the employee's speech may be fairly characterized as constituting speech touching upon a matter of public concern. Dill versus City of Edmond, 155 F.3d, 1193, Tenth Circuit 1998. This issue is decided as a matter of law. Anderson versus McCotter, 100 F.3d, 723, 728, Tenth Circuit, 1996.

This circuit has repeatedly held that, quote, matters of public concern are those of interest to the community, whether for social, political or other reasons, close quote. Lighton versus University of Utah, 209 F.3d, 1213, 1224, Tenth Circuit 2000; Lytle versus City of Haysville, Kansas, 138 F.3d 857, 864, Tenth Circuit 1998; Dill, 155 F.3d at 1202.

In assessing whether speech is protected, the Court must consider the, quote, content, form and context of a given statement as revealed by the whole record, close quote. Dill, 155 F.3d at 1202, citing again Connick, 461 U.S. at 147.

Matters solely of personal interest to government employees are not protected by the First Amendment. Dill, 155 F.3d at 1202. The Dill court further established that, quote, although speech related to internal personnel disputes ordinarily does not involve public concern, speech which discloses any evidence of corruption, impropriety or other malfeasance on the part of city officials clearly concerns matters of public concern—excuse me—of public import, close quote. Id. at 1202. See also Lighton, 209 F.3d at 224 and 1225 which states, quote, when the identified speech focuses on disclosing a public official's malfeasance or wrongdoing, it is most likely a matter of public concern. Conversely, it is generally not considered protected speech if its aim is simply to air grievances of a purely personal nature.

While this Court appropriately showed deference to the plaintiff's contentions regarding whether her speech involved a matter of public concern at the summary judgment phase of the proceeding, the Court considers the present motion in light of the, quote,

content, form and context of the statement as revealed by the record as a whole, close quote. Id.

Public interest in a topic, even the intense public interest that certainly exists in the Ramsey murder investigation, does not lead to the conclusion that the plaintiff's speech implicates a matter of public concern. The Court relies on Koch at 847 F.2d at 1445.

The fascination of the press and the public cannot dictate to this Court the scope of the plaintiff's protected speech under the First Amendment. To the extent any of the Court's previously stated findings contradict this clear edict of Tenth Circuit precedence, they are withdrawn.

The plaintiff's own testimony is susceptible to only one factual conclusion: That the plaintiff desired to respond to adverse comments concerning her involvement in the JonBenet Ramsey investigation. Unlike the facts in Dill, the plaintiff was not asserting that she was attempting to bring exculpatory facts or evidence of a murder investigation to light. To the contrary, here the plaintiff asserted no acts of police or prosecutorial corruption, impropriety or other malfeasance. Her sole concern dealt with how she was being portrayed in the public media.

While the plaintiff now asserts that the defendant's failure to respond to media criticism compromised the murder investigation and rendered her a scapegoat for the failure of the Ramsey investigation generally, that strongly held opinion can hardly be seen as one addressing corruption or malfeasance within the department.

In the present case, the plaintiff's otherwise uncorroborated testimony that she was told by Commander Eller that she was a, quote, scapegoat, close quote, for errors committed by other Ramsey investigators does not establish that her speech touched upon a matter of public concern. The unfortunately circumstance in which the plaintiff found herself was created not by her public employer but by the various media in which her performance was discussed.

Even if the scapegoat scenario is believed, the issue whether the employer should speak out on her behalf or allow her to speak out on her own behalf is still primarily an issue reassembling a personal grievance. In the context of this murder investigation, the object of the plaintiff's speech designed to dispel her status as a scapegoat was not to further the investigation itself but to repair what she perceived to be her damaged reputation at the expense of the reputation of the department and potentially other individual officers and the investigation itself. Even if the speech would have been factually correct, it involved a matter of private, not public concern.

In making its determination, the Court may appropriately, quote, focus on the motive of the speaker and whether the speech is calculated to disclose misconduct, close quote. Lighton, 209 F.3d 1224. The plaintiff's own testimony in the present action indicates that the speech was, in her own mind, designed solely to eradicate public misconceptions regarding her performance in the Ramsey investigation.

Furthermore, her testimony establishes that her speech was neither designed to disclose police misconduct, nor to address concerns the public may

have had regarding the Boulder Police Department. Instead, the plaintiff desired a general denial of eight specific statements published relating to her own job performance, and those eight statements are contained in a letter from her former lawyer, Judge Jackson.

Like the plaintiff in Hess versus Board of Education of Township High School District Number 211, Cooke County, Illinois, 848 F.2d 748, Seventh Circuit, 1988, the plaintiff's speech would have been designed to address perceived deficiencies in her job performance. In Hess the court concluded that the plaintiff's general reference to, quote, educational policies, close quote, and, quote, public school, close quote, was insufficient to establish that his speech touched upon a matter of public concern. Id. at 751 and 52.

Likewise, in the present case, Mr. Van Blaricom's general reference to "public concern" and, quote, trust in the police, close quote, are not sufficient to establish a public concern. In fact, those expressed concerns - excuse me - those expressed opinions on an ultimate conclusion of law made by Mr. Van Blaricom, in the judgment of this Court, intrude upon the province of this Court to determine whether or not the plaintiff's speech touched upon a matter of public concern. The only other element of Mr. Van Blaricom's testimony that might be considered evidence on the issue of public concern was his testimony as to the National Law Enforcement Policy Center's model policy on police-media relations. This policy has neither been endorsed by the Boulder Police Department, nor did Mr. Van Blaricom testify that it had been endorsed nationally.

In fact, the introductory policy statement attached to that policy expressly disclaims that it even represents the, quote, official position or policies of the International Association of Chiefs of Police, close quote, the promulgating organization. See Exhibit 98.

Furthermore, even if the Court accepts the model policy as an applicable standard, the witness' testimony neglects to point out that at least a portion of the plaintiff's speech would be in violation of that very policy. The policy states that the police should not release statements to the news media, quote, concerning the identity, anticipated testimony or credibility of perspective witnesses, close quote, or, quote, any opinions regarding the merits of the case or the quality of the evidence, close quote.

As the Hess court went on to say, quote, to presume that all matters which transpire within government offices are of public concern would mean that virtually every remark and certainly every criticism directed at a public official would plant the seed of a constitutional case, close quote. Id. at 752.

To find that the plaintiff's speech in this case touches upon an issue of public concern would be to automatically place primacy of the reputation of the individual officer at the expense of the integrity of the investigation itself. The ramifications of such a decision would be profound, for it would certainly create the possibility of a constitutional claim each and every time an individual officer is subjected to public criticism in the media for his or her performance in the line of duty. Such a ruling by this Court would take the Court into perilous, unchartered waters. It is not for this Court to undertake such a journey.

In a personal sense, all people of compassion can feel empathy for Ms. Arndt. She has been in the center of a national notorious case. She was criticized by certain media observers, and certainly much of that criticism was inaccurate, unfair or unfounded.

She was also placed in a situation on the evening - on the day after the disappearance of the child December 26th in the home of the decedent, placed in a position where she had to manage that scene for a period of time and no - and alone; and that will, of course, no doubt be of interest to a judge, jury and lawyers in any murder trial which may occur in the future. Her desire to speak out on this unfairness is understandable, but that does not give rise to a constitutional claim.

I have told the parties, both Ms. Arndt and these chiefs of police, that I sympathize for them; that I see no villains in this case. They were caught in the undercurrent of a case that carried great national/international interest. Each of these officers did the best that they could under difficult circumstances. None of them have been demonstrated to be incompetent based on the evidence before this Court, and the Court is satisfied that they have been treated by some irresponsible members of the press with invective of the cruelest kind.

The Court has a great respect for the press and its essential role in preserving our democracy. The press, however, has a heavy burden to maintain balance, to recognize its obligation to understand issues before they print or say things that are destructive.

This young officer, Detective Arndt, has literally been pushed over the edge by these unflattering and often untrue comments. Whether some other aspects of their criticism turn out to be true or not, of course, remain to be seen.

And it has to be candidly observed that neither Ms. Arndt nor other officers of the department comported themselves in a way that they would now if they had it to do all over again.

This ruling of the Court ends this case. Of course, the plaintiff has a right to appeal this decision; and, of course, I'm confident that the Court of Appeals will want to review every aspect and the manner in which this case was managed by me, as it should.

These are very difficult issues; and, as counsel has told me, they have found little in the way of case law that is factually directed on point to the issues that we're dealing with here.

I want to assure the parties that I make these decisions after a great deal of thought, and I hope that at least the opportunity to air your grievances in a public forum has some personal value to both Ms. Arndt and to the department. But for the reasons I have stated, the motion for judgment as a matter of law is granted.

(END OF ORAL RULING)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LINDA ARNDT, Plaintiff-Appellant, v. THOMAS KOBY and MARK BECKNER, individually and in their official capacity; THE CITY OF BOULDER, a municipal corporation, Defendants-Appellees	No. 01-1356

ORDER

Filed December 6, 2002

BEFORE **BRICOE, ANDERSON,** and **O'BRIEN,** Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

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Entered for the Court
PATRICK FISHER, Clerk of Court,

BY: /s/
DEPUTY CLERK

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